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IN THE

Supreme Court Of The United States

October Term, 1988

No. 87-2075

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, et al.,
Petitioners

v.

MEDICAL LAUNDRY SERVICES, A DIVISION OF OPLCO, INC.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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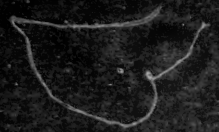

QUESTION PRESENTED FOR REVIEW

Do claims "arising out of" a contract for services awarded by a state agency, which are reviewable under state law procedures, establish a property interest protected by the due process requirements of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. § 1983?

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions, statutes and regulations involved are the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. § 1983, Section 14 of the Constitution of Alabama of 1901, and §§ 41-9-60 *et seq.* of the Code of Alabama (1975).

STATEMENT OF THE CASE

Respondent Medical Laundry Services ("MLS") adopts the Statement of the Case in the Petition for a Writ of Certiorari by Petitioners The Board of Trustees of the University of Alabama, et al. ("Board of Trustees").

REASONS FOR DENYING THE WRIT

By the opinion below, the Eleventh Circuit has done no more than recognize a species of property protected by the Fourteenth Amendment, the deprivation of which without due process gives rise to a cause of action under 42 U.S.C. § 1983. The species recognized is a contract for services which falls under the jurisdiction of the Board of Adjustments for the State of Alabama. The decision does not blindly allow an ordinary breach of contract claim to provide a basis for a § 1983 action. Rather, the opinion below simply holds that the adjudicatory process of Alabama's Board of Adjustments constitutes a "set of rules" which secures a protected property interest in certain types of contracts with the state, including the one here. The decision conforms with this Court's statements in *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) and *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), that property interests are "defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." The decision below thus is fully in accord with the decisions of this Court and should not be reviewed.

I. The Decision Below Does Not Expand the Scope of 42 U.S.C. § 1983 but Interprets the Statute in Conformity with *Roth* and *Sindermann.*

The petitioners misstate the nature of the relief sought by respondent in this matter. The complaint does not state a claim for breach of contract. Rather, the complaint seeks relief for the termination of a contract with a state agency

without due process of law. Respondent's action is based upon the absence of a pre-termination hearing prior to the termination of its contract with petitioners and the failure of the procedures utilized by the Board of Adjustments in hearing respondent's claims to meet minimum due process requirements.[1] Thus, the issue in this case is not whether a simple breach of contract gives rise to an action under 42 U.S.C. § 1983, but whether the state agency terminated the particular contract for services at issue here without regard to constitutional due process requirements.

As a predicate to any action under 42 U.S.C. § 1983, plaintiff must establish that the contract at issue encompasses a "property" interest protected under the Fourteenth Amendment. In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2708, 33 L.Ed.2d 548, 561 (1972), this Court stated protected property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." The phrase "property interest" is not limited by a few technical forms; rather, it denotes a broad range of interests in a variety of types of property. *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570, 580 (1972).

Petitioners argue that property interests under 42 U.S.C. § 1983 have been limited to "contracts of 'tenure' and other expectancies to be terminated only for cause." This Court, however, has not defined the term so narrowly. That "prop-

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[1]MLS' appeal to the Eleventh Circuit was from an order granting petitioners' motion to dismiss (which was treated as a motion for summary judgment). MLS expects to establish that the proceedings before the Board of Adjustments failed to comport with minimum due procees in a number of respects, including but not limited to the following: (1) Failure to provide pre-deprivation notice and opportunity to be heard; and (2) Inadequate or unfair post-deprivation procedures including (a) *ex parte* communications between petitioners and members of the Board; (b) failure to notify MLS of a visit by members of the Board to petitioners' hospital for the purpose of viewing additional evidence and interviewing additional witnesses; and (c) failure by the Board to make findings of fact regarding the denial of MLS' claims.

erty", as defined by state law, is not confined to employment contracts or terms of employment which create an expectation of continued employment is demonstrated by the following cases: *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (right to redress employment discrimination under state law); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) (interest earned on funds deposited with court in interpleader action); *Barry v. Barchai*, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979) (horse trainer's license); *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) (utility service); *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (disability benefits); *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) (high school education); *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) (driver's license); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (welfare benefits).

The decision by the Eleventh Circuit in this action follows logically from this Court's decisions analyzing the nature of a protected property interest. Although MLS is prohibited from seeking redress in court for the petitioners' termination of the contract at issue due to state sovereign immunity, the State of Alabama has established a Board of Adjustments (the "Board") with jurisdiction to hear claims "arising out of any contract, express or implied, to which the state of Alabama or any of its . . . institutions . . . are parties. . . ." *Ala. Code* § 41-9-62(a)(5) (1975).[2] The Board is authorized to find any facts "necessary for a proper adjustment" of these claims, and to award damages arising therefrom. *Ala. Code* § 41-9-68(a) (1975). In addition, the Board may order the damages to be paid out of the appropriations made to a particular state agency or department, *see Ala. Code* § 41-9-69 (1975), or may direct the state treasurer to pay pursuant to the awards of the Board. *Ala. Code* §41-9-72 (1975).

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[2]As further evidence that this decision does not have the breadth attributed to it by petitioners, *Ala. Code* § 41-9-62(a)(5)(b) imposes severe limitations on the types of contracts which actually fall under jurisdiction of the Board of Adjustments.

These rights clearly create a property right in a service contract such as the one at issue here. A person who enters into such a contract with the state or a state agency has no reason to expect the state will be allowed to arbitrarily, capriciously or wrongfully terminate or breach the contract. This expectation flows from the adjudicatory procedures of the Board of Adjustments, established by state law. The Board of Adjustments operates a "set of rules" which secures MLS's interest in its contract with the Board of Trustees, thus triggering the due process protections of the Fourteenth Amendment. The Eleventh Circuit's decision is consistent with the opinions of this Court regarding the nature of property interests protected by the Fourteenth Amendment, and should not be reviewed.

II. The Decision Below Does Not Conflict with the Decisions of Other Circuit Courts of Appeal.

Petitioners cite decisions of other circuit courts of appeal for the proposition that a complaint which merely alleges breach of contract by a government entity does not state a cause of action under 42 U.S.C. § 1983. MLS agrees with this proposition. MLS denies, however, the cases cited in the petition for certiorari involved allegations of procedural defects, as asserted in this case. Here MLS alleges its due process rights were created by state law, not by the contract alone. Thus, the decisions cited by the Board of Trustees have no bearing on the issue presented by this proceeding.

Most of the cases cited in the petition for certiorari turn not on the existence or nonexistence of a property right but on a failure to allege a constitutionally defective procedure. *See, Costello v. Town of Fairfield,* 811 F.2d 782 (2d Cir. 1987) (a claim that the denial of an increase in retirement benefits deprived plaintiffs of property rights, with no allegations concerning the procedure to determine entitlement to those benefits, turns upon question of contract interpretation and does not give rise to a cause of action under § 1983); *Boston Environmental Sanitation Inspectors Assn. v. City of Boston,* 794 F.2d 12 (1st Cir. 1986) (allegations that defendants breached state statutes and labor contracts do not form the basis of a

§ 1983 action); *Sudeikis v. Chicago Transit Authority,* 774 F.2d 766 (7th Cir. 1985) (alleged deprivation of liberty and property interests through violation of a settlement agreement, without more, does not give rise to a constitutional claim); *Casey v. Depetrillo,* 697 F.2d 22 (1st Cir. 1983) (allegations that defendant's breach of contract deprived plaintiffs of property without due process of law, with no allegation of any procedural inadequacy of defendant's treatment of plaintiffs, fails to state a claim for relief under federal law); *Cloutier v. Town of Epping,* 714 F.2d 1184 (1st Cir. 1983) (allegation that city violated an agreement does not state a claim for constitutional violation); *Heath v. City of Fairfax,* 542 F.2d 1236 (4th Cir. 1976) (allegation that denial of a salary increase "for reasons insufficient in both law and fact to warrant denial" amounts to a breach of contract claim and does not state a claim under 42 U.S.C. § 1983).

Two other of the opinions cited by petitioners merely held plaintiffs did not possess a constitutionally protected property interest, not that their claims were for breach of contract and therefore did not state a cause of action under 42 U.S.C. § 1983. Indeed, claimants in both cases were not even parties to a contract. *See, Coastland Corp. v. County of Currituck,* 734 F.2d 175 (4th Cir. 1984) (because plaintiff was not a third party beneficiary of the contract at issue, plaintiff had no property interest protected by the procedural due process requirements of the Fourteenth Amendment); *Schlake v. Beatrice Production Credit Assn.,* 596 F.2d 278 (8th Cir. 1979) (plaintiff had no constitutionally protected property interest by virtue of an application for a loan from an instrumentality of the federal government).

Another case cited by plaintiff as conflicting with the Eleventh Circuit decision below merely held that plaintiff was not entitled to a pre-termination hearing, not that plaintiff failed to state a claim under 42 U.S.C. § 1983. *Boucvalt v. Board of Commissioners of Hospital Service,* 798 F.2d 722 (5th Cir. 1986) (anesthesiologist was not entitled to a hearing prior to the termination of a contract for anesthesia services with a public hospital).

Finally, one case cited by petitioners actually supports the decision below by holding that a complaint which alleges deprivation of a property interest without due process is not a mere contract claim, even though the property interest is alleged to be founded in contract. *Braden v. Texas A & M University System,* 636 F.2d 90, 93 (5th Cir. Unit A, 1981).

Petitioners have failed to demonstrate any conflict between the decision of the Eleventh Circuit and decisions by other circuit courts of appeal. The issues and concerns addressed in the opinions cited by the Board of Trustees are not present in this matter. There is no need for this Court to review the decision below.

CONCLUSION

For the foregoing reasons, the Court should not issue a writ of certiorari to the Court of Appeals for the Eleventh Circuit to review the decision below.

Respectfully submitted,

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